

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

**Daniel J. and Mary L. Hart,**

**Chapter 7**

**Debtor(s).**

**BK 04-34269 GFK**

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**NOTICE OF HEARING ON MOTION TO DISMISS CHAPTER 7 CASE**

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TO: The Debtor, all creditors and other parties in interest:

The United States Trustee has filed a motion to dismiss the above-captioned case for substantial abuse under 11 U.S.C. §707(b).

The Court will hold a hearing on this motion at 2:00 P.M. on November 23, 2004, in Courtroom No. 228 B, at the United States Bankruptcy Court, United States Courthouse, at 316 N. Robert Street, in St. Paul, Minnesota.

Any response to this motion must be filed and delivered not later than November 18, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than November 12, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1.

Dated: \_\_\_\_\_

CLERK OF BANKRUPTCY COURT

By: \_\_\_\_\_  
Deputy Clerk

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

**Daniel J. and Mary L. Hart,**

**Chapter 7**

**Debtor(s).**

**BK 04-34269 GFK**

---

**NOTICE OF HEARING AND MOTION TO DISMISS UNDER 11 U.S.C. § 707(b)**

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TO: The debtor(s) and other entities specified in Local Rule 9013-3.

1. The United States Trustee, by his undersigned attorney, moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion at 2:00 P.M. on November 23, 2004, in Courtroom No. 228 B, at the United States Bankruptcy Court, United States Courthouse, at 316 N. Robert Street, in St. Paul, Minnesota.

3. Any response to this motion must be filed and delivered not later than November 18, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than November 12, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1. UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. Sections 157 and 1334, FED.R.BANKR.P. 5005 and Local Rule 1070-1. The United States Trustee has standing to file this motion pursuant to 28 U.S.C. Section 586(a) and 11 U.S.C. Section 307. This proceeding

is a core proceeding. The petition commencing this Chapter 7 case was filed on July 23, 2004. The case is now pending in this Court.

5. This motion arises under 11 U. S. C. Section 707(b) and FED.R.BANKR.P. 1017, 2002 and 4004. This motion is filed under FED.R.BANKR.P. 9014 and Local Rules 9013-1 to 9013-5. Movant requests that this case be dismissed.

6. From the lists, schedules and statements filed by the debtors, it appears that they have the ability to pay a substantial portion of their dischargeable debt without hardship.

7. The debtors list the following debts:

- (a) On Schedule D, Creditors Holding Secured Claims, the debtors list two claims totaling \$ 274,534.74 secured by a first and second mortgage on the homestead.
- (b) On Schedule E, Creditors Holding Unsecured Priority Claims, the debtors list no claims.
- (c) On Schedule F, Creditors Holding Unsecured Nonpriority Claims, the debtors list eight claims totaling \$ 56,477.40.

8. The debts listed in the debtors' Schedule of Liabilities appear to be primarily consumer debt. *See* Debtors' Schedule F. The debtors checked on the Petition that the nature of the debts are consumer/non-business.

9. On Schedule I, the debtors list monthly net income of \$ 3,144. The debtors are married and list two minor aged dependents and two adult aged dependents. Mr. Hart is listed as unemployed and Ms. Hart is listed as employed by Affinity Plus Federal Credit Union.

10. The Chapter 7 trustee notified the U.S. Trustee that at the Section 341 meeting of creditors held on August 27, 2004, that the debtors testified Mr. Hart has a new job at U.S. Bank and will make \$ 88,000 per year (or \$ 7,333 per month) at his new job.

11. On September 21, 2004, the United States Trustee wrote a letter requesting additional financial information, including current pay stubs. Att. Ex. 1. The debtors responded by providing old pay and unemployment stubs. Att. Ex. 2 (without attachments).

12. The United States Trustee sent a follow-up letter dated October 6, 2004, re-requesting current pay stubs. Att. Ex. 3. On October 7, 2004, counsel responded and stated that he forwarded the pay stub request to the debtors. Att. Ex. 4. The current pay stubs were faxed to the Office of the U.S. Trustee on October 25, 2004 (cover letter dated October 21, 2004). Att. Ex. 5.

13. Based on the pay stub of Mary L. Hart<sup>1/</sup>, for pay period ending 10/8/04, she has the following net income:

YTD Gross	\$ 19,933.63
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Less YTD Deductions	(5,254.05)
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Net \$ 14,679.58 divided by 22 pay periods x 26 pay periods divided by 12 months = \$ 1,445.72 net pay per month.<sup>2/</sup>

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<sup>1/</sup>For security, the pay stubs are not attached to avoid dissemination of sensitive information on the internet. Upon request, the U.S. Trustee can provide a copy of these documents to counsel for the debtor (if a copy was not retained) or the chapter 7 trustee and may submit the pay stubs at any hearing.

<sup>2/</sup> The debtors represent that the 401K contributions are mandatory, but submitted no documentation to support this statement. Since 401K contribution are generally voluntary and no documentation was submitted to find otherwise, 401K contributions are omitted from the net income figure. See e.g. *In re Harshbarger*, 66 F.3d 775 (6th Cir.1995) (adopting per se rule that voluntary contributions into 401K account are disposable income for Section 1325 purposes); *In re Anes*, 195 F.3d 177 (3rd Cir.1999) (adopting per se rule that voluntary contributions to retirement plan constitute disposable income under Section 1325) *In re Taylor*, 243 F.3d 124 (2d Cir.2001) (adopting a case by case test to look at the age of the debtor, the mandatory nature of the contributions and impact on employment, dollar amount of any penalties, and other circumstances); *In re Delnero*, 191 B.R. 539, 542 (Bankr. N.D.N.Y. 1996); *In re Cornelius*, 195 B.R. 831 (Bankr. N.D.N.Y. 1995); *In re Cavanaugh*, 175 B.R. 369, 373 (Bankr. D. Idaho 1994); *In re Scott*, 142 B.R. 126, 135 (Bankr. E.D. Va. 1992) (not reasonably necessary under §1325(b)); *In re Fountain*,

Based on the pay stub ending 9/30/04 for Mr. Hart, he has the following net pay:

\$ 2,490.73 (net bi-monthly pay) x 2 = \$ 4,981.46 per month.

Therefore, the U.S. Trustee will estimate that Mr. Hart has net income of \$ 4,766.66.00 per month, based on \$ 7,333.33 gross per month x 35% for reductions.

Total net income of the debtors totals \$ 6,427.18 per month.

14. On Schedule J, the debtors list monthly expenses of \$ 3,539.77.

15. Average net monthly income of \$ 6,427.18 less monthly expenses of \$ 3,539.77 provides the debtors with monthly disposable income of \$ 2,887.41 per month.

16. The debtors can pay their general unsecured creditors 100% with disposable income of \$ 1,568.88 per month in a hypothetical thirty six month Chapter 13 plan.

17. The debtors are currently employed, and there does not appear to be any likelihood that their employment will be terminated at any time in the future.

18. The debtors have the ability to repay a substantial portion of their general unsecured debt and there appears to be no reason for their unwillingness to do so.

19. As an alternative to dismissal, the United States Trustee does not oppose voluntary conversion of this case to Chapter 13.

WHEREFORE, the United States Trustee respectfully requests that this chapter 7 case be dismissed.

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142 B.R. 135, 137 (Bankr. E.D. Va. 1992) (cannot make voluntary contribution unless pay Ch. 13 creditors in full); *In re Ward*, 129 B.R. 664, 668 (Bankr. W.D. Okla. 1991); *In re Colon Vazquez*, 111 B.R. 19, 20 (Bankr. D. Puerto Rico 1990); *In re Festner*, 54 B.R. 532, 533 (Bankr. E.D.N.C. 1985); *In re Harshburger*, 66 F.3d 775, 777 (6<sup>th</sup> Cir. 1995) (Ch 13 case: not necessary for maintenance or support); *Collins v. Hesson (In re Hesson)*, 190 B.R. 229, 237-38 (Bankr. D. Md. 1996).

Dated: October 25, 2004

Respectfully submitted,  
HABBO G. FOKKENA  
United States Trustee  
Region 12

By: /s/ Sarah J. Wencil  
Sarah J. Wencil  
Trial Attorney  
United States Trustee's Office  
1015 United States Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415  
IA ATTY No. 14014  
(612) 664-5500

# EXHIBIT 1



**U. S. Department of Justice**

Office of the United States Trustee

*Districts of Minnesota, North Dakota,  
South Dakota and Iowa*

September 21, 2004

Joel Monke  
7650 Currell Blvd., Suite 315  
Woodbury, MN 55125

Re: Daniel & Mary Hart  
Bky 04-34269

U.S. Courthouse, Suite 1015  
300 South Fourth Street  
Minneapolis, MN 55415

612 / 664-5500  
FAX 612 / 664-5516

Dear Mr. Monke,

As you are aware, the Office of the United States Trustee must investigate every debtor pursuant to 11 U.S.C. §707(b). Please provide the following documentation/information on or before October 8, 2004;

1. Copies of the last four pay stubs for each debtor. If the pay stubs show a deduction for 401(k) or similar retirement plan, please advise if the deduction is voluntary or mandatory. If the pay stubs show a deduction for 401(k) loan repayment, please advise as to the balance of the loan and the estimated payoff date.
2. Copies of 2002 and 2003 state and federal tax returns, including W-2s, 1099s, and all other attachments and schedules.
3. Copies of bank statements and check registers for the last six months for all accounts owned by the debtors.

Please call if you have a question or concern about this letter. Thank you for your assistance in this matter.

Sincerely,

**HABBO G. FOKKENA**  
United States Trustee

By Tom Kleiner  
Tom Kleiner  
Bankruptcy Analyst

cc: Daniel & Mary Hart  
7591 Newbury Road  
Woodbury, MN 55125

Patti Sullivan, Chapter 7 Trustee



# EXHIBIT 2

JOEL C. MONKE  
ATTORNEY AT LAW  
7650 CURRELL BOULEVARD  
SUITE 315  
WOODBURY, MINNESOTA 55125  
TELEPHONE (651) 735-8657 • FAX (651) 735-0449

RECEIVED

2004 OCT -6 A 9:33

OFFICE OF THE  
UNITED STATES TRUSTEE

October 4, 2004

Mr. Tom Kleiner  
Bankruptcy Analyst  
U. S. Department of Justice  
Office of the United States Trustee  
U. S. Courthouse, Suite 1015  
300 South Fourth Street  
Minneapolis, MN 55415

Re: Daniel James Hart and Mary Lou Hart – Chapter 7 Bankruptcy Petition  
Case No.: 04-34269-GFK

Dear Mr. Kleiner:

In response to your letter of September 21, 2004, please find enclosed herewith copies of the following documents, in connection with the above-entitled matter:

- 1) For Daniel Hart:
  - a) MN Dept. of Employment & Economic Development -  
Unemployment check stubs --  
For weeks ending 04/24/04 through 05/29/04;
  - b) Norstan, Inc. - Earnings check stub -  
Final stub, showing severance pay - dated 04/16/04;
- 2) For Mary Hart:

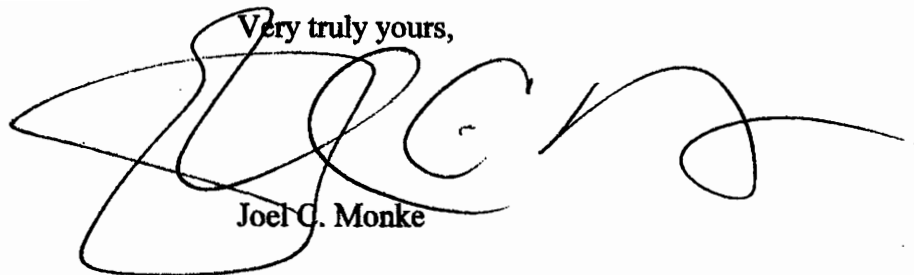
Affinity Plus Federal Credit Union - Earnings check stubs --  
For periods ending 03/06/04 through 06/12/04.  
Note: 401(k) deduction is mandatory.
- 3) Copies of the Harts' 2003 and 2003 tax returns, including W-2s and attachments;

Mr. Tom Kleiner, Bankruptcy Analyst  
U. S. Department of Justice - Office of the United States Trustee  
October 4, 2004  
Page 2

- 4) Copies of the Harts' U.S. Bank Statements:
- a) Checking account no.: 1-047-7053-9070 --  
For periods ending 02/27/04 through 08/23/04:
  - b) Checking account no.: 1-047-7207-8911 --  
For periods ending 03/09/04 through 09/10/04;
  - c) Uni-Statement:  
For periods ending 03/10/04 through 09/13/04 --  
Checking account no.: 1-047-7226-1301  
Standard saving no.: 2-047-8110-0829  
Standard saving no.: 2-047-8110-0852  
Standard saving no.: 2-047-8110-0894

If you need further documentation from my clients, please feel free to contact me.

Very truly yours,

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Joel C. Monke

JCM/ce  
Enclosures

# **EXHIBIT 3**



**U. S. Department of Justice**

Office of the United States Trustee

*Districts of Minnesota, North Dakota,  
South Dakota and Iowa*

October 6, 2004

Joel Monke  
7650 Currell Blvd., Suite 315  
Woodbury, MN 55125

Re: Daniel & Mary Hart  
Bky 04-34269

U.S. Courthouse, Suite 1015  
300 South Fourth Street  
Minneapolis, MN 55415

612 / 664-5500  
FAX 612 / 664-5516

Dear Mr. Monke,

I have reviewed the documentation sent in response to my September 21, 2004 letter. Please address the following:

1. In my letter, I requested copies of the last four pay stubs for each debtor. In response, you sent earnings and unemployment stubs from March, April, May and June. Please provide copies of the last four pay stubs for each debtor.
2. The debtors' August/September bank statement for U.S. Bank account 1047720789110 shows a payroll deposit of \$2,449.97 from Wyde Corporation on August 31. Please advise who works at Wyde Corporation, when they started, and their monthly salary. The copies of pay stubs requested in item 1 should include those received from Wyde.

Please provide the requested documents and information by October 13, 2004. Thank you for your assistance in this matter.

Sincerely,

**HABBO G. FOKKENA**  
United States Trustee

By Tom Kleiner  
Tom Kleiner  
Bankruptcy Analyst

cc: Daniel & Mary Hart  
7591 Newbury Road  
Woodbury, MN 55125

Patti Sullivan, Chapter 7 Trustee

# EXHIBIT 4



RECEIVED

2004 OCT 12 A 9:50

OFFICE OF THE  
UNITED STATES TRUSTEE

JOEL C. MONKE  
ATTORNEY AT LAW  
7650 CURRELL BOULEVARD  
SUITE 315  
WOODBURY, MINNESOTA 55125  
TELEPHONE (651) 735-8657 • FAX (651) 735-0449

October 7, 2004

Mr. Tom Kleiner  
Bankruptcy Analyst  
U. S. Department of Justice  
Office of the United States Trustee  
U. S. Courthouse, Suite 1015  
300 South Fourth Street  
Minneapolis, MN 55415

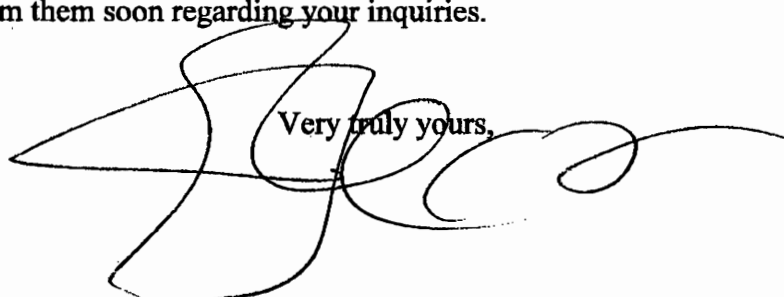
Re: Daniel James Hart and Mary Lou Hart – Chapter 7 Bankruptcy Petition  
Case No.: 04-34269-GFK

Dear Mr. Kleiner:

Please find enclosed additional documentation from my clients, regarding their U. S. Bank checking account no. 1-047-7226-1301.

Also, please be advised that I am forwarding a copy of your October 6 letter to the Harts, and I expect to hear from them soon regarding your inquiries.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to read 'JCM', is written over the closing 'Very truly yours,'.

Joel C. Monke

JCM/ce  
Enclosure  
cc: Dan and Mary Hart

# **EXHIBIT 5**



JOEL C. MONKE  
ATTORNEY AT LAW  
7650 CURRELL BOULEVARD  
SUITE 315  
WOODBURY, MINNESOTA 55125  
TELEPHONE (651) 735-0657 • FAX (651) 735-0449

October 21, 2004

**Via Fax & U.S. Mail:**

Mr. Tom Kleiner, Bankruptcy Analyst  
U. S. Department of Justice  
Office of the United States Trustee  
U. S. Courthouse, Suite 1015  
300 South Fourth Street  
Minneapolis, MN 55415

Re: Daniel James Hart and Mary Lou Hart – Chapter 7 Bankruptcy Petition  
Case No.: 04-34269-GFK

Dear Mr. Kleiner:

This letter is in response to your letter of October 6, 2004. I apologize that these responses are sent to you after your requested deadline.

Please find enclosed copies of the following:

- 1) Mary Hart's last four pay statements:  
Pay periods ending 08/21/04, 09/04/04, 09/18/04, and 10/02/04 --  
From Affinity Plus Federal Credit Union;
- 2) Daniel Hart's last three pay statements:  
Pay period ending 08/15/04 --  
No pay stub -- Mr. Hart was unemployed;  
Pay period ending 08/31/04 -- From Wyde Corporation;  
Pay periods ending 09/15/04 and 09/30/04 -- From U. S. Bank;

Concerning Mr. Hart's employment at Wyde Corporation, he writes, "I worked for Wyde for 2 weeks and I quit because it was not a fit for me and I also had another job offer at US bank for approximately the same amount of money, more vacation, and better benefits etc."

If you need any further information, please let me know.

Very truly yours,



JCM/ce  
Enclosures  
cc: Dan and Mary Hart

Joel C. Monke

### **VERIFICATION**

I, Sarah J. Wencil, trial attorney for the United States Trustee, the movant named in the foregoing motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on: October 25, 2004

Signed: /s/ Sarah J. Wencil  
Sarah J. Wencil  
Trial Attorney

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

**Daniel J. and Mary L. Hart,**

**Chapter 7**

**Debtor(s).**

**BK 04-34269 GFK**

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

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The United States Trustee submits this memorandum in support of his motion to dismiss this case under 11 U.S.C. § 707(b). *See* Local Rule 9013-2(a).

**Analysis**

A Motion to Dismiss for Substantial Abuse is governed by Section 707(b) of the Bankruptcy Code, which provides:

After notice and a hearing, the court, on its own motion or on a motion by the United States trustee but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make charitable contributions (that meet the definition of ‘charitable contribution’ under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4).

11 U.S.C. § 707(b) (1994) (as amended by Religious Liberty and Charitable Donation Protection Act of 1998). The United States Trustee bears the burden of showing substantial abuse. *In re Dubberke*, 119 B.R. 677, 679 (Bankr. S.D. Iowa 1990).

**(1) The Debtor's Debts Are Primarily Consumer Debts.**

Section 101(8) of the Bankruptcy Code defines "consumer debts" as "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8) (1994). "Debt" is defined as a "liability on a claim." 11 U.S.C. § 101(12) (1994). "Claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A) (1994).

The purpose of the debt generally determines whether a debt is a consumer debt. *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 913 (9th Cir. 1988); *In re Palmer*, 117 B.R. 443, 446 (Bankr. N.D. Iowa 1990). If the credit transaction does not involve a business transaction or a profit motive, it is usually regarded as a consumer debt. *Palmer*, 117 B.R. at 446 (citing *In re Booth*, 858 F.2d 1051, 1054-55 (5th Cir. 1988)); *In re Berndt*, 127 B.R. 222, 223 (Bankr. D.N.D. 1991) (citing *Kelly* and *Booth*, but distinguishing *Booth* by concluding that private investment debts, not used to further an ongoing business, were consumer debts).

In the present case, it appears that the debts listed on Schedule F are primarily consumer debts. The debtors checked on the Petition that the nature of the debts are consumer/non-business.

**(2) The Granting of Relief under Chapter 7 Constitutes  
Substantial Abuse of Chapter Seven of the Bankruptcy Code.**

To satisfy the "substantial abuse" standard under Section 707(b), the Eighth Circuit has ruled that the primary consideration is whether the debtor has the ability to fund a 13 plan. *In re Walton*, 866 F.2d 981, 984 (8th Cir. 1989) (following *In re Kelly*, 841 F.2d 908, 914-15 (9th Cir. 1988); *United States Trustee v. Harris*, 960 F.2d 74, 76 (8th Cir. 1992); *Fonder v. United States*, 974 F.2d 996, 999 (8th Cir. 1992); *Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829,

831 (8th Cir. 1994) (comparing § 707(b) to § 707(a)).

While bad faith on the part of the debtor may constitute substantial abuse under Section 707(b), bad faith is not required to be shown to satisfy the "substantial abuse" standard when the debtor is otherwise able to repay his or her debts out of future income:

This is not to say that inability to pay will shield a debtor from section 707(b) dismissal where bad faith is otherwise shown. But a finding that a debtor is able to pay his debts, standing alone, supports a conclusion of substantial abuse.

*Walton*, 866 F.2d at 985 (quoting *In re Kelly*, 841 F.2d at 914-15); *Harris*, 960 F.2d at 76 (stating that "egregious behavior" by the debtor is not a necessary element for a Chapter 7 case to be dismissed under Section 707(b)). While the unique hardships and the good faith of the debtor are relevant factors, those factors are not as important as the ability of the debtor to fund a Chapter 13 plan. *Walton*, 866 F.2d at 983; *see also Harris*, 960 F.2d at 77 (rejecting the "totality of the circumstances" test espoused by the Fourth Circuit Court of Appeals in *Green v. Staples (In re Green)*, 934 F.2d 568, 572 (4th Cir. 1991), in favor of examining whether a debtor may fund a Chapter 13 plan out of future income).

Whether the debtor is eligible to file a petition under Chapter 13 after a Section 707(b) dismissal is also not a relevant factor, and likewise, the debtor cannot be forced to file a Chapter 13 petition after a 707(b) dismissal order is entered if the debtor is qualified for Chapter 13 relief. *Fonder*, 974 F.2d at 999. "The essential inquiry remains whether the debtor's ability to repay creditors with future income is sufficient to make the Chapter 7 liquidating bankruptcy a substantial abuse of the Code." *Id.*

In addition, the Eighth Circuit holds that a bankruptcy court may reject the credibility of amended schedules when the amendments are offered after a Section 707(b) motion is filed and the

amended schedules seek to decrease income and/or increase expenses because the debtor swore as to the accuracy of the initial schedules. *Fonder*, 974 F.2d at 1000.

In the District of Minnesota, there is no set percentage of repayment that must be met for substantial abuse to be present. The District Court of Minnesota opines that the determination of what is substantial should be made on a case-by-case basis:

In this Circuit, there is no clear cut formula or quantitative, threshold percentage of debt that must be repaid under a Chapter 13 plan in order to constitute grounds for dismissal for "substantial abuse." See Walton; Fonder; see also In re Schmidt, 200 B.R. 36, 38 (Bankr. D. Neb. 1996).... Rather, (and until such a threshold is articulated), Bankruptcy Courts are to use their best judgment to determine what repayment percentage is appropriate on a case-by-case basis. Considering the record before it, the Bankruptcy Court concluded, without comment, that a 35% repayment plan over a three year term was sufficient to constitute "substantial abuse." After conducting a de novo review of the record, this Court agrees. An ability to contribute more than \$17,000 towards \$ 44,000 of unsecured debt is "substantial."

*Mathes v. Stuart (In re Mathes)*, Civil File No. 3-96-906, slip op. at 6-7 (D. Minn. July 2, 1997)  
*See also In re Shirley Wilkins*, 1997 WL 1047545 (Bankr. D. Minn. March 26, 1997) (Kishel, J.)  
(holding that the ability to pay 28% in three years or 49% in five years of unsecured debts was a substantial abuse under § 707(b)).

In the present case, it appears that the debtors have the ability to pay 100% of the general unsecured creditors in a hypothetical thirty six month Chapter 13 plan. It is appropriate to look at future income of the debtors to consider an ability to pay under 11 U.S.C. § 707(b). See In re Walton, 866 F.2d 981, 983-984 (8<sup>th</sup> Cir. 1989) (holding that the court looks to "the debtor's ability to pay his debts out of his **future** income"). [Emphasis added.]

WHEREFORE, the United States Trustee submits this memorandum in support of his motion to dismiss the above-captioned case as a substantial abuse of the Bankruptcy Code.

Dated: October 25, 2004

Respectfully submitted,

HABBO G. FOKKENA  
United States Trustee  
Region 12

By: /s/ Sarah J. Wencil  
Sarah J. Wencil  
Trial Attorney  
United States Trustee's Office  
1015 United States Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415  
IA ATTY No. 14014  
(612) 664-5500

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

**Daniel J. and Mary L. Hart,**

**Chapter 7**

**Debtor(s).**

**BK 04-34269 GFK**

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**CERTIFICATE OF MAILING**

---

I, Emily Rohr, certify under penalty of perjury that I am an employee in the Office of the United States Trustee for the District of Minnesota and am a person of such age and discretion as to be competent to serve papers.


That on October 25, 2004, I served a copy of the Proposed Notice of Hearing, Motion to Dismiss Under 11 U.S.C. §707(b), Memorandum of Law in Support of Motion to Dismiss; and proposed Order in the above-referenced case by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Minneapolis, Minnesota.

**Addressee(s):**

Joel C. Monke  
7650 Currell Boulevard, Suite 315  
Woodbury, MN 55125

Patti J. Sullivan  
P.O. Box 16406  
St. Paul, MN 55116

Daniel J. and Mary L. Hart  
7591 Newbury Road  
Woodbury, MN 55125

  
Office of the United States Trustee  
Emily Rohr



**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

**Daniel J. and Mary L. Hart,**

**Chapter 7**

**Debtor(s).**

**BK 04-34269 GFK**

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**ORDER**

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At St. Paul, Minnesota, the \_\_\_\_\_ day of \_\_\_\_\_, 2004, the United States Trustee's Motion to Dismiss under 11 U.S.C. § 707(b) came before the Court for hearing.

Appearances were noted in the record.

The Court made its findings of fact and conclusions of law on the record pursuant to Rule 52 of the Federal Rules of Civil Procedure and Bankruptcy Rule 7052.

**IT IS HEREBY ORDERED:**

That the Chapter 7 bankruptcy case filed by the above-captioned debtors is dismissed pursuant to 11 U.S.C. Section 707(b).

---

The Honorable Gregory F. Kishel  
United States Bankruptcy Judge